United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
JOHN F. O'CONNELL

76-7363

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Application

—of—

ANTCO SHIPPING COMPANY, LIMITED,

Petitioner-Appellant,

—against—

SIDERMAR S.p.A.,

Respondent-Appellee,

For an Order and Judgment pursuant to Article 75, CPLR staying a certain proposed arbitration.

In the Matter of the Arbitration

—between—

SIDERMAR S.p.A.,

Cross-Petitioner-Appellee,

—and—

ANTCO SHIPPING COMPANY, LIMITED and NEW ENGLAND PETROLEUM CORPORATION,

Cross-Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

Cases Cited

STATUTES CITED

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Counter Statement of the Issues

1. Does the presence of the words "excluding Israel" in a clause designating safe loading ports in an international contract of affreightment, not involving exports from the United States, violate the anti-boycott provisions of the Export Administration Act or regulations promulgated thereunder?

2. Does the presence of the cited words violate Section 296.13 of the New York Executive Law?

3. May a party to a contract to which the United Nations Convention on the Recognition and Enforcement of Arbitral Awards applies, avoid its duty to arbitrate disputes thereunder upon the ground that the contract clause specifying ports for loading of cargo allegedly furthers a boycott condemned by the above federal statute and regulations?

4. May Section 296.13 of the New York Executive Law be applied to bar arbitration under an international, commercial contract to which the above Convention applies?

5. Is the guarantor of a contract, who agrees to "fulfill and perform any and all obligations" of one party to the contract, excused from arbitrating disputes under an arbitration clause therein covering "any and all disputes arising under" the contract?

Statement of the Case

The nature of the case, the course of proceedings and its disposition in the court below are adequately indicated in appellants' brief under "Preliminary" (pp. 1-2).

The statement of facts by District Judge Haight (57a-60a) is adopted as Sidermar's statement of the facts relevant to the issues presented for review.

Set forth in the Addendum hereto are Chapter 2 of the United States Arbitration Act (implementing the United Nations Convention) and pertinent sections of the regulations issued pursuant to the Export Administration Act. For the pertinent portions of the United Nations Convention, the Export Administration Act and the New York Executive Law, see the Addendum to appellants' brief (pp. 32-37).

ARGUMENT

I.

The contract of affreightment does not violate the Export Administration Act or Regulations.

Appellants, Antco and Nepco,* contend that the term in the loading clause of the contract of affreightment removing Israeli ports from the category of safe ports for loading oil under the contract, violates the Export Administration Act, 50 U.S.C. App. §§ 2401 *et seq.* and the Department of Commerce Regulations promulgated thereunder, 15 C.F.R. Part 369.** Not so.

Preliminarily, although Antco's counsel state baldly that "the obvious purpose" of the "excluding Israel" term in the loading clause was to "curry favor with the Arab countries" or to "foster and promote their boycott of Israel (Brief, p. 14)," this is merely a self-serving assumption on their part. That there were cogent considerations, not boycott oriented, for not deeming Israeli ports to be among the "safe ports Mediterranean Sea" where vessels were to load is plain; for, in 1973 when the contract was signed, the danger of hostilities in Israeli ports was all too real. (53a).

Judge Haight properly declined Antco's invitation to take judicial notice that the "excluding Israel" term was in-

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* The appellants will be referred to as "Antco" except in Point IV which concerns Nepco only.

** The Export Administration Act of 1969 expired on September 30, 1976, as provided in 50 U.S.C. App. §2413. The President extended the effectiveness of the rules and regulations issued under the Act by Executive Order 11940 of September 30, 1976. 41 Federal Register 43707-8 (October 4, 1976).

serted by Sidermar in order to somehow curry favor with the Arab world (65a) because that proposition is, at minimum, "subject to reasonable dispute" and hence not judicially noticeable under Rule 201(b) of the Federal Rules of Evidence. Apart from that, assuming *arguendo* the truth of Antco's proposition in respect to the purpose of the "excluding Israel" provision, as did Judge Haight, the more significant point is that neither the Export Administration Act and its Regulations nor such United States policy as may be reflected by them are contravened or offended by the presence of the phrase in this contract of affreightment.

The Regulations (1) prohibit shipping companies and others from signing agreements where such action "has the *effect* of furthering or supporting" certain restrictive trade practices (15 C.F.R. § 369.2(a), referring to the Arab "blacklist" of U.S. firms), and (2) discourage the same parties from taking such action "that has the *effect* of furthering or supporting" certain other restrictive trade practices or boycotts (15 C.F.R. § 369.3(a), referring generally to the Arab boycott of Israel) (Emphasis supplied). The exclusionary term here concerned does not run afoul of either section because—never having been enforced (or intended to be enforced) through a request by Antco for a lifting of crude oil in Israel and a refusal of Sidermar to comply—the term lacks the "effect" essential to bring either section into play.

Furthermore, and most conclusively, the Export Administration Act and Regulations do not touch any phase of this contract because the Act deals only with U.S. exports. Thus, the Act authorizes only the issuance of implementing regulations that "may apply to the financing, transporting

and other servicing of *exports* and the participation therein by any person." 50 U.S.C. App. § 2403(b)(1) (Emphasis supplied).

Under this contract of affreightment Sidermar agreed to carry, and Antco agreed to supply, cargoes of petroleum to be transported from the Mediterranean or Nigeria to the Bahamas or the United States Gulf. Thus the contract might give rise to imports into the United States, but never to exports from this country. For, although Antco persists in arguing to the contrary (Brief, p. 18), nothing in Article 9 of the contract (sometimes called the "back-haul" provision) or anywhere else in the contract, remotely suggests that either party is, or has been, engaged in exporting from the United States. Article 9 merely serves to notify Antco that inasmuch as the combined carriers used by Sidermar to perform the contract will probably carry "dry cargoes *for their own account* as back-haul voyage to Mediterranean," some difficulties may arise in "exact scheduling" of vessel arrivals at Antco's Mediterranean loading ports. (19a, 26a) (Emphasis supplied). Thus, Sidermar is not in any sense an "exporter" or engaged in any regulated exporting activity under the contract of affreightment; nor, for that matter, is Antco.

As Judge Haight pointed out, neither the Congress nor the executive branch have ever purported to extend the Act or Regulations to any transactions other than export transactions (66a); hence, Antco's position in this case amounts to nothing more than an attempt to avoid liability for breach of the contract by arguing that the contract somehow violates an *inapplicable* statute or regulation.

II.

The contract does not violate the New York Executive Law.

Antco charges that the exclusionary term is an "unlawful discriminatory practice" condemned by Section 296.13 of the New York Executive Law, through calling the term "a boycott and refusal to trade with an entire nation and millions of persons because of race, creed or national origin." (Brief, p. 19). In fact, the exclusionary term does not come close to being that or the kind of action or practice condemned by the New York statute. It is simply a geographical limitation on the movement of Sidermar's vessels; it does not state any refusal to deal with particular persons or any persons at all; it states only where the carrying vessels are not supposed to go for the loading of cargo, purely as a safety precaution.

Furthermore, the contract of affreightment and its contemplated performance lack the contacts with New York that would be needed for any New York statute to apply to it. Although Antco may have happened to sign the contract at its New York offices, the signature for Sidermar was affixed by its broker, Nolarma S.p.A., whose office is in Genoa, Italy. Moreover, the notion that the law of the place of making of a contract is automatically applicable has long since been discarded by our courts. Antco is a Bahamian corporation and Sidermar is an Italian corporation; and the mere fact that invoices were to be mailed to Antco in care of another corporation with a New York address is of no meaningful significance. This contract of affreightment was to be performed in international waters

and in foreign countries. No tenable basis exists for the New York statute to reach out and touch this contract or the legality of its loading port exclusion.

Antco's reliance upon the New York statute fails for still another reason: its enactment is an impermissible attempt by a State to enter an area preempted by existing and comprehensive federal law—namely, the sections of the Export Administration Act and Regulations discussed in Point I of this brief. At the time the New York statute went into effect (January 1, 1976), Congress and the executive branch already had a functioning statutory and regulatory scheme respecting the Arab blacklist and boycott, all pursuant to exclusively federal powers in respect to interstate and foreign commerce, foreign relations and national defense. Where, as here, Congress has preempted a field in which it is competent, any state regulation of the same subject matter is void though it be more stringent than the federal regulation.

> "The test * * * is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

De Canas v. *Bica*, 424 U.S. 351 (1976), cited by Antco (Brief, p. 21), is not to the contrary. There, a California statute prohibited employment of certain "illegal" aliens in that State. The Supreme Court found that California, in enacting the statute, was addressing local problems and conditions and so was not regulating the entry of aliens

into this country, which regulation is the exclusive function of the U. S. Immigration and Naturalization Act. As the Court stated,

> "In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils." (424 U.S. at 357.)

The California statute did not attempt to do what the Act of Congress was already doing; there was no preemption. The Supreme Court contrasted the California legislative action with that involved in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) and *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), in which the Court struck down state legislation because "both federal statutes were in the specific field which the States were attempting to regulate * * *." 424 U.S. at 362.

Here, under Antco's interpretation, New York, like the States concerned in *Hines* and *Nelson*, is attempting to regulate compliance with the Arab boycott and blacklist which are scarcely "local problems". Such regulation is in the "specific field" where the Federal Export Act and Regulations operate and control. Consequently, Section 296.13 of the New York Executive Law is unconstitutional and void; under the Supremacy Clause it must yield to the Federal Act and Regulations. U.S. Const., Art. VI, cl. 2.

For the above reasons, and those which will be explained in Point III, the New York statute cannot touch or strike

down this contract because of its containing a loading port exclusion which, in the nature of things, would not have any practical effect on the carrying-out of the contract in any case.

III.

The Convention requires enforcement of this agreement to arbitrate.

In 1970 the United States acceded to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 UST 2517, TIAS 6997, 330 UNTS 3, reproduced following 9 U.S.C.A. § 201; and Congress promptly enacted Chapter 2 of the Arbitration Act, 9 U.S.C. §§ 201-208, to implement the Convention. The instant contract of affreightment comes under the Convention as a commercial agreement between two foreign corporations (9 U.S.C. § 202); Judge Haight so held (69a), and Antco so concedes (Brief, p. 11).

Under the Convention a United States court entertaining an action between parties who have made an arbitration agreement falling under the Convention "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention Art. II (3).

Antco's argument that the contract is "null and void" as contrary to the public policy of the United States and New York State evidenced by the above-mentioned statutes and regulations has already been met. But even if it is assumed *arguendo* that any or all of those statutes

and regulations are violated by the exclusionary term in the loading clause of the contract, Anteo still must arbitrate the dispute under the contract with Sidermar in accordance with the Convention.

A. *U. S. Policy in Favor of Arbitration.*

United States accession to the Convention and Congressional enactment of Chapter 2 of the Arbitration Act demonstrate this country's strong policy favoring arbitration of international commercial disputes. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974), reh. den., 419 U.S. 885; *Fotochrome, Inc.* v. *Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975). The predictability and basic fairness of agreeing in advance to a particular forum for resolution of such disputes are much favored, even in the face of potentially countervailing local policies. Thus, in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court held that an English forum-selection clause in an international towage contract was valid and must be enforced despite the convenience of a U.S. District Court and the fact that the English court would likely enforce certain exculpatory clauses invalid in this country as against public policy (407 U.S. at 8). Said the Court:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. • • • We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." (407 U.S. at 9)

The same considerations are equally applicable in the context of agreements to arbitrate disputes under international commercial contracts of the type concerned here. As a majority of the Supreme Court stated in *Scherk, supra*:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
>
> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. • • • Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." (417 U.S. at 516-17.)

B. *Public Policy Defense to be Narrowly Construed.*

The "public policy" defense accorded by the "null and void" language of Article II(3) of the Convention is to be construed narrowly, especially in view of the above-dis-

cussed policy strongly favoring arbitration of international commercial disputes.

The recent decision of this Court in *Parsons & Whittemore Overseas Co., Inc.* v. *Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), enforcing a foreign arbitration award under the Convention, is particularly apposite here. An Egyptian corporation (RAKTA) and an American company (Overseas) entered into an Agency for International Development ("AID") U.S. State Department-financed contract (with an arbitration clause) to build a paper mill in Egypt. Shortly before construction was completed, and before the outbreak of the Arab-Israeli Six-Day War, the Egyptian government broke off diplomatic relations with the United States and ordered all Americans out of Egypt. AID, pursuant to 22 U.S.C. § 2370(p), (q), (t), withdrew its financial support of the construction project, and Overseas, "as a loyal American citizen" either had to abandon the project or defy what the Court called a United States "national policy". Overseas invoked "force majeure" provisions of the contract and withdrew. RAKTA obtained an International Chamber of Commerce arbitration award of damages and sought enforcement of this award pursuant to the Convention in the Southern District of New York under Chapter 2 of the U.S. Arbitration Act. Overseas defended on the ground, afforded by Article V(2)(b) of the Convention, that enforcement of such an award would contravene United States public policy. Overseas also opposed enforcement by urging that Article V(2)(a) of the Convention authorized the Court to decline to enforce a foreign arbitral award if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that [the forum] country."

This Court, after a painstaking analysis of the purposes and drafting of the Convention, upheld enforcement of the award, stating:

> "An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement. *See* Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, in *id.* at 191 (remarks of Professor W. Reese). Additionally, considerations of reciprocity—considerations given express recognition in the Convention itself—counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.
>
> "We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. *Cf.* 1 Restatement Second of the Conflict of Laws § 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918)." (508 F.2d at 973-74).

In the present case Judge Haight examined thoroughly Antco's "public policy" defense and, turning to *Parsons* for guidance, determined that the rationale for narrow construction of the "public policy" defense to enforcement of a foreign award "applies with equal force to considerations, within the context of enforcement of the arbitration agree-

ment itself, of whether the contract in question is 'null and void' under Article II(3) of the Convention." (71a) He therefore correctly concluded "that, in the circumstances of this case, enforcement of the arbitration agreement in the Sidermar/Antco agreement would not contravene the public policy of the United States." (73a)

C. *"National" Not "Public" Policy Relates to Boycotts and Blacklists.*

Antco is mistaken in arguing that United States or New York "public policy" as contained in statutes or regulations opposing boycotts and blacklists, is such as to render offending contracts void. The preemptive federal statute and regulations are at most evidence of a political position taken by this country in aid of its political interests and freedom of commerce of the type which this Court, in *Parsons, supra,* aptly termed a "national policy" rather than the type of "public policy" envisaged by the Convention. Thus in *Parsons* this Court held that the United States policy inherent in our dealings with Egypt-Israel affairs did not present public policy issues sufficient to bar enforcement of an award rendered pursuant to an international arbitration agreement under the Convention. The Court drew a sharp distinction between such *national* policy and the *public* policy that may bar enforcement under the Convention, stating:

> "Under this view of the public policy provision in the Convention, Overseas' public policy defense may easily be dismissed. Overseas argues that various actions by United States officials subsequent to the severance of American-Egyptian relations—most particularly, AID's withdrawal of financial support for the

> Overseas-RAKTA contract—required Overseas, as a loyal American citizen, to abandon the project. Enforcement of an award predicated on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States public policy. In equating "national" policy with United States "public" policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy." Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supra national emphasis." (508 F.2d at 974).

Finally, the Court rejected Overseas' argument that (because of the policy issues involved) a United States Court would never have compelled arbitration in the first place and therefore under Article V(2)(a) of the Convention should not enforce the award. In so doing, the Court held that the underlying dispute would indeed have been arbitrable under United States law. Thus, the Court stated:

> "The mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable. Rather, certain *categories* of claims may be non-arbitrable because of the special national interest vested in their resolution. *Cf.* American Safety Equipment Corp., *supra*, 391 F.2d 821 at 826-827. Furthermore,

> even were the test for non-arbitrability of an ad hoc nature, Overseas' situation would almost certainly not meet the standard, for Overseas grossly exaggerates the magnitude of the national interest involved in the resolution of its particular claim. Simply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is vitally interested in its outcome. Finally, the Supreme Court's decision in favor of arbitrability in a case far more prominently displaying public features than the instant one, Scherk v. Alberto-Culver Co., *supra,* compels by analogy the conclusion that the foreign award against Overseas dealt with a subject arbitrable under United States law." (508 F.2d at 975).

Antco (Brief, pp. 15-17) attempts to get around *Parsons* by saying that that case involved an "ephemeral" policy of the United States declared merely by government officials and not by Congress, whereas here the policy is characterized by Antco as a "settled, declared public policy." In reality, however, the policy of the United States involved in *Parsons,* far from being "ephemeral" or of non-Congressional origin, was embodied in statutes enacted by Congress: 22 U.S.C. § 2370(p) prohibited the giving of financial assistance to Egypt, naming that country specifically; 22 U.S.C. § 2370(q) and (t), respectively, prohibited any assistance to countries more than six months in default under U.S. foreign-aid loans and to countries severing diplomatic relations with the United States. Yet this Court held the policy evidenced by those statutes was not the kind of "public" policy which would permit our courts to deny enforcement of an award under the Convention, or, indeed, to decline to compel arbitration at the instance of a contracting party.

If this Court were to rule as Anteo requests, thereby rendering an entire contract of affreightment null and void on account of a phrase in its loading clause (which was not even likely to have any practical effect or impact on the performance of the contract at all), such action would place in jeopardy innumerable other international contracts involving staggering amounts which are directly within the ambit of the cited federal regulations. The Export Administration Act and its implementary regulations do not purport to render such contracts as are covered by them void—or voidable at the behest of a party seeking to evade his solemn obligations. They simply make certain provisions of such contracts subject to monitoring procedures. The contracts themselves remain valid and enforceable.

This is buttressed by the promulgation of new regulations, effective October 7, 1976, requiring publication by the U. S. Department of Commerce of boycott-related restrictions reported to it. 15 C.F.R. § 369.4(c). The remedy provided by the Federal framework is public scrutiny of such restrictions; and courts cannot properly be called upon to go farther than the Congress or executive branch have been willing to go by striking down contracts containing such restrictions. Notably, the very recent Presidential memorandum directing the Secretary of Commerce to make reports available to the public stated:

> "During the past year, there has been a growing interest in and awareness of the impact of the Arab Boycott on American business. Disclosure of boycott-related reports will enable the American public to assess for itself the nature and impact of the Arab Boycott and to monitor the conduct of American companies.

> I have concluded that this public disclosure will strengthen existing policy against the Arab Boycott of Israel without jeopardizing our vital interests in the Middle East. The action I am directing today should serve as a reaffirmation of our national policy of opposition to boycott actions against nations friendly to us." (41 Federal Register at 44862 [October 13, 1976].)

Clearly, the cited statutes and regulations evince no public policy that would require, or even authorize, this Court to invalidate this international contract of affreightment which does not even fall within the scope of such statutes or regulations.

D. *Antco's Alleged Public Policy Does Not Affect the Validity of This Contract.*

Antco relies heavily upon *Hurd* v. *Hodge*, 334 U.S. 24 (1948) for the proposition that courts of the United States may not enforce private agreements that violate federal public policy. (Brief, pp. 11-12). Such reliance is misplaced.

In *Hurd* the Supreme Court held that restrictive real-estate covenants directed against black purchasers could not be enforced in the courts of the District of Columbia (1) because such judicial action would contravene the 1866 Civil Rights Act and (2) because such enforcement would be contrary to United States public policy as manifested in the Fourteenth Amendment. 334 U.S. at 33-36. Thus, the very enforcement sought in the courts was precisely that which violated public policy. (The courts below had divested petitioners of their property titles.) Here, on the other

hand, no party is seeking enforcement of the allegedly violative term. For that reason, Anteo's attempt to style Sidermar's petition as an action for specific performance of an illegal contract fails. Sidermar's petition to compel arbitration does seek relief in the nature of specific performance, as Anteo's cases (Brief, p. 12) point out. But the performance sought is performance of Anteo's obligation to arbitrate disputes, and the only United States policy touching that obligation requires enforcement.

Hurd involved an illegal obligation at the very heart of the contract. Here, on the other hand, the purportedly offending clause is a minor and unimportant one. Any notion that Anteo, in the absence of the clause, would ever have occasion to ship crude oil from Israel is far-fetched, at best, and its mere presence cannot be seized upon to invalidate the contract or bar the relief sought by Sidermar.

Anteo's other authorities are equally wide of the mark. In *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4 Cir. 1953), *aff'd on other grounds*, 348 U.S. 296, a U.S. executive agreement with Canada contravened an act of Congress, and on that basis the court decided it was contrary to United States public policy. Consequently, a private contract embodying the terms of the executive agreement was unenforceable as against public policy. 204 F.2d at 660. In *Lewis* v. *Jackson & Squire, Inc.*, 86 F. Supp. 354 (D. Ark. 1949), *appeal dismissed*, 181 F.2d 1011 (8 Cir. 1950), the trustees of mining unions' pension funds brought actions against the employer companies to collect payments allegedly overdue under wage agreements. The court found that the agreements' provisions for union shops were illegal under Arkansas statutes and hence void. The court then held all parts of the agreements unenforceable because it

found the parties intended the union shop provisions to be essential to the agreements. Its firm bases for this conclusion were that (1) the agreements all provided, "This Agreement is an integrated Instrument and its respective provisions are interdependent . . . ." and (2) the United Mine Workers had conducted a strike in support of its contention that its wage agreements must include the provision. 86 F. Supp. at 361.

Here, the exclusionary term in the loading clause of the contract is not essential to the contract as a whole; nor is there any evidence that the parties ever intended that it be of the essence of their agreement, despite Antco's unsupported conjecture to the contrary (Brief, p. 26).

Thus, in order for enforcement to be denied, the very essence of the obligation in dispute must be prohibited by public policy. The New York rule respecting agreements to arbitrate is to the same effect, as this Court observed in *Island Territory of Curacao* v. *Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973), cert. den. 416 U.S. 986:

> "In re Kramer & Uchitelle, 288 N.Y. 467, 43 N.E. 2d 493 (1942), heavily relied upon by appellant for the proposition that, at least as a matter of New York law, a proceeding to enforce an arbitration contract presupposes the existence of a valid and enforceable contract at the time the remedy is sought, has been limited, In re Exercycle Corp., 9 N.Y.2d 329, 335-336, 174 N.E.2d 463, 465-466, 214 N.Y.S.2d 353, 356-358 (1961), to the situation in which public policy as embodied in a statute forbids the performance which is the subject of dispute, a policy and statute which are as binding upon the arbitrators as upon the courts." (489 F.2d at 1320.)

In *Kramer & Uchitelle,* the contract contained a price term illegal under Federal Price Administration regulations. Here, however, no policy or statute "forbids the performance which is the subject of dispute," namely the obligation of Antco to furnish cargoes under this contract of affrieghtment. Consequently, Antco must proceed to arbitrate the dispute as demanded by Sidermar. As Judge Haight explained:

> "Israeli ports are excluded; but assuming *arguendo* that the exclusion in some manner contravenes public policy as expressed in the Export Regulation Act, it still falls far short of entirely forbidding Antco's performance under the contract." (70a.)

An arbitration agreement is separable from the other parts of a contract, and hence may be valid even if some substantive provisions are illegal or otherwise voidable. *Robert Lawrence Co., Inc.* v. *Devonshire Fabrics, Inc.,* 271 F.2d 402, 410 (2 Cir. 1959), *cert. dismissed,* 364 U.S. 801; *Weinrott* v. *Carp,* 32 N.Y.2d 190, 198 (1973). Thus, enforcement of an arbitration agreement may be denied only where the most basic elements of the underlying contract are themselves unenforceable. *See, e.g., Metro Plan, Inc.* v. *Miscione,* 257 App. Div. 652, 15 N.Y.S.2d 35 (1st Dept. 1939) (holding that usury in underlying chattel mortgage would oust the arbitrators of jurisdiction). Such is not the case here.

In sum, Antco must arbitrate because nothing forbids "the performance which is the subject of dispute" herein, and because the policy of the Convention requires arbitral resolution of that dispute.

IV.

NEPCO as guarantor must also arbitrate.

The arbitration clause of the Essovoy (1969) charter form applicable herein calls for arbitration of "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter * * *." (59a) Nepco, in its guarantee letter of November 1, 1973, guaranteed "to fulfill and perform any and all legal obligations that Antco may be liable for as Charterers under said Contract of Affreightment." (60a).

One of the "legal obligations" which Nepco agreed "to fulfill and perform" was the obligation to arbitrate disputes, and under the guarantee and the above arbitration clause Nepco must join in the arbitration between Sidermar and Antco.

A nearly identical situation was before this Court recently in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2 Cir. 1975), *cert. den.* —— U.S. ——, 49 L. Ed. 2d 387. There, the guarantor had agreed to "perform the balance of the contract and assume the rights and obligations of [charterer] on the same terms and conditions as contained in the Charter Party." 527 F.2d at 969-70. The guarantor was called upon to arbitrate a dispute arising under the charter. This Court held the guarantor was obligated to do so, noting first that the arbitration clause applied to all disputes and not just to those between owner and charterer, and second that the guarantor had agreed to "assume the rights and obligations" of the charterer. 527 F.2d at 973-74.

The two cases are identical except for the absence here of the word "assume". Nepco seeks to distinguish *Nereus* upon the ground that to "assume" the obligations of another is more than to "fulfill and perform" such obligations. Such an interpretation strains common sense and disregards the plain meaning of words. Judge Haight could perceive no difference of substance between the guarantee language here and that in *Nereus*. (76a-77a) There is none.

The case of *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F.Supp. 721 (S.D.N.Y. 1959), is not in point. There the guarantor guaranteed the charterer's performance under a charter party. The arbitration clause called for arbitration of "any dispute • • • between Owners and the Charterers • • • ." Taking this narrow language to mean that the only arbitration contemplated thereby was that between the owner and the charterer, the court relieved the guarantor from arbitrating. 172 F.Supp. at 722.

Here, on the other hand, the arbitration clause is a broad one not limited to disputes between the two parties to the contract of affreightment, and moreover Nepco agreed to fulfill and perform all Antco's contract obligations (not just its obligation as charterer to pay freight and provide cargoes). Clearly Nepco is bound to arbitrate the disputes herein with Sidermar.

Lastly, because of the existence of questions of law and fact common to the disputes between all the parties hereto, all three parties should arbitrate together in a consolidated arbitration, as Judge Haight ordered below. (78a.) *Nereus, supra*, 527 F.2d at 974-75; *Vigo S.S. Corp.* v. *Marship Corp. of Monrovia*, 26 N.Y.2d 157, 161-163 (1970), *mot. to amend remittitur denied*, 27 N.Y.2d 535, 671, *cert. den.*, 400 U.S. 819.

Conclusion

For the above reasons, the order of Judge Haight denying Antco's petition for a stay of arbitration and directing that a consolidated arbitration proceed between Antco, Nepco and Sidermar should be affirmed.

Respectfully submitted,

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ADDENDUM

ADDENDUM

9 U.S.C. §§ 201-208—United States Arbitration Act, Chapter 2

§ 201. *Enforcement of Convention*

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. *Agreement or award falling under the Convention*

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. *Jurisdiction; amount in controversy*

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28)

shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. *Venue*

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. *Removal of cases from State courts*

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. *Order to compel arbitration; appointment of arbitrators*

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. *Award of arbitrators; confirmation; jurisdiction; proceeding*

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. *Chapter 1; residual application*

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

15 C.F.R. Part 369—Restrictive Trade Practices or Boycotts

§ 369.1 *General policy.*

Section 3(5) of the Export Administration Act of 1969, as amended, declares that it is the policy of the United States "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States." The portion of Section 4(b)(1) of the Act implementing this policy provides that "all domestic concerns receiving requests for the furnishing of information or the signing of agreements as specified in . . . (Section 3(5)) must report this fact to the Secretary of Commerce for such action as he may deem appropriate to carry out the purposes of that Section."

§ 369.2 *Discrimination on the basis of race, color, religion, sex, or national origin.*

(a) Prohibition of compliance with requests. All exporters and related service organizations (including, but not limited to, banks, insurers, freight forwarders, and shipping companies) engaged or involved in the export or negotiations leading towards the export from the United States of commodities, services, or information, including technical data (whether directly or through distributors, dealers, or agents), are prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice fostered or imposed by foreign countries against other countries friendly to the United States, which practice discriminates, or has the effect of

discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin.

(b) Examples of requests. To be subject to the requirements of this § 369.2, the discrimination sought to be effectuated by the request must be directed at a particular race, color, religion, sex, or national origin. There are many words or phrases that could place a request in this category. Examples are inquiries as to the place of birth or the nationality of parents of employees, stockholders, or directors, or inquiries as to whether they are "Jewish," "negro," "female," etc. Further examples are inquiries using any code words to further or support discrimination on the basis of race, color, religion, sex, or national origin.

• • • • •

§ 369.3 *Other restrictive trade practices or boycotts.*

(a) Policy concerning compliance with requests. All exporters and related service organizations engaged or involved in the export or negotiations leading to the export from the United States of commodities, services, or information, including technical data (whether directly or through distributors, dealers, or agents), are encouraged and requested to refuse to take any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting other restrictive trade practices or boycotts fostered or imposed by foreign countries against any country not included in Country Groups S, W, Y, or Z. It should be noted that the boycotting of a U.S. firm by another U.S. firm in order to comply with a restrictive trade practice by foreign countries against other countries friendly to the United States may constitute a violation of United States antitrust laws.

(b) Examples of requests. (1) Basically this Section covers restrictive trade practice requests to implement *economic* sanctions applied by one country against another country friendly to the United States. These are aimed at restricting certain types of business relationships that U.S. firms might otherwise undertake. The requests may be aimed at a particular country, nationals of that country, or firms or organizations that may be involved in commercial or other activity with a particular country. They may take the form of a request for a certification as to the "nationality" of individuals (e.g. "Israeli" or "South African," as opposed to national origin or ethnic background), the country of origin of the goods, or the absence of a firm from the "blacklist" of a country or group of countries.

• • • • •

§ 369.4 *Reporting requirements.*

Any U.S. exporter receiving or informed of a request for an action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice or boycott, as described in §§ 369.2 or 369.3 above, shall report the request to the Office of Export Administration, Room 1617M, U.S. Department of Commerce, Washington, D.C. 20230. Where such request is received by any person or firm other than the exporter, handling any phase of the transaction for the exporter, that person or firm (forwarding agent, shipping company, bank, insurer, etc.) must also report the request to the Office of Export Administration. The report shall be submitted in accordance with the procedure set forth in paragraph (a) of this section for requests described in § 369.2 and in paragraph (b) of this section for

requests described in § 369.3. The information contained in these reports is subject to the provisions of Section 7(c) of the Export Administration Act of 1969 regarding confidentiality.

• • • • •

(a) Reporting requests covered by § 369.2. Each request to take any action that would further or support a restrictive trade practice or boycott in a way that would discriminate, or have the effect of discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin as defined in § 369.2, must be reported individually to the Office of Export Administration, U.S. Department of Commerce, Washington, D.C. 20230, within 15 business days of receipt.

• • • • •

(b) Reporting requests covered by § 369.3. Requests to take action that would further or support a restrictive trade practice or boycott as defined in § 369.3 may be reported either individually or quarterly.

• • • • •

(c) Disclosure of Information. Forms DIB-630P (Rev. 2-76) and DIB-621P (Rev. 2-76) reporting the receipt of a restrictive trade practice request which was received by the reporting firm on or after October 7, 1976, shall be made available to the public for inspection and copying, except that information relating to quantity, value, commodity and the identity of the consignee, will be withheld pursuant to applicable provisions of the Freedom of Information Act, as amended (5 U.S.C. § 552), if the reporting firm so requests on the basis that disclosure of this information could place reporting firms at a competitive disadvantage.

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36